

MAPPING TRANSGRESSIONS: THE ROAD TO PRIVACY

by

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### **Abstract**

Recent developments in technology, Supreme Court case law, and state legislation have created a conundrum of what used to be a somewhat simple application of the law regarding privacy rights and the Fourth Amendment. Technology may have outpaced jurisprudence in that respect, and thus requires that the Court reevaluate several standards and doctrines established through case law. In particular the Court needs to review the prudence of the “public accessibility” and “reasonable expectation” standards, as well as the necessity of probable cause and search warrants.

Technological advances have occurred at a rapid rate in the past 30 years. Televisions, telephones, and cameras have evolved to perform a number of functions, enabling society to enjoy a plethora of technological options. For example, the internet has enabled scores of individuals to reveal information to the public through various websites, such as Facebook, Instagram, and Twitter. These individuals can keep up with family, reminisce about high school, or share vacation photos with the use of such sites. Despite this, some have argued that, with the increasing sophistication of technology, particularly social media, the level of privacy that society possesses is being diminished. While many individuals will display photos and stories on websites voluntarily, technology is able to collect information from individuals without their knowledge. For example, cell phones are able to track an individual's whereabouts, and the internet is able to provide the address, telephone number, and criminal records of selected individuals. With the exciting opportunities that advancing technology can provide, it can also bring concerns about how much information is disclosed to the public.

One form of technology that has come under scrutiny is the use of drones, both by the government and the public. The development of drones has brought with it the possibility of others zooming in through windows from an aerial perspective using camera attachments. Recently, drones have become publicly accessible, with the market making them financially feasible to obtain. This could be used for various types of surveillance, such as that by thieves, stalkers, and kidnappers. Fortunately, simple home security measures can thwart many of these things. What is more concerning however, is what can be done when this type of surveillance is being used by the police force? And, just as concerning, is it a violation of the Fourth Amendment?

Case law set forth by the U.S. Supreme Court indicates that Fourth Amendment issues are anything but settled. In the case *Kyllo vs. United States* (2001), the U.S. Supreme Court created a standard for when technology could be used by the police to search a home without a warrant. In the majority opinion, Justice Antonin Scalia wrote,

We think that obtaining by sense-enhancing technology any information regarding the interior of the home that could not otherwise have been obtained without physical "intrusion into a constitutionally protected area, "*Silverman*, constitutes a search--at least where (as here) the technology in question is not in general public use... (P. 6-7).

However, the Supreme Court left a portion of the doctrine open ended that could potentially be used to acknowledge the advances in technology. Also in this opinion Scalia stated,

We rejected such a mechanical interpretation of the Fourth Amendment in *Katz*, where the eavesdropping device picked up only sound waves that reached the exterior of the phone booth. Reversing that approach would leave the homeowner at the mercy of advancing technology--including imaging technology that could discern all human activity in the home. While the technology used in the present case was relatively crude, the rule we adopt must take account of more sophisticated systems that are already in use or in development (P. 7-8).

In his opinion, Scalia discussed whether or not the use of sensory enhancing technology is an intrusion of privacy; however, technology that is not available to the general public cannot be used by the government in a search. Despite this, more and more technology is becoming available to the public every day and, at first glance, *Kyllo* seems to be a case in which

technology just happened to outpace jurisprudence. Have technology and the forces of the market worked together to make the *Kyllo* decision null and void? In order to determine the constitutionality of a search by drone or other sensory enhancing technology and the validity of the “accessible to the general public” doctrine, this paper examines the Fourth Amendment and its interpretation in case law. In particular, this paper highlights case law, the impact of technology on the Fourth Amendment, and recent changes in state laws that pertain to the area of interest.

### **What is Privacy?**

Scholars with different views on the right to privacy both agree that the issue revolves around not what someone (the government) knows about an individual, but about the how the information was obtained (Thomson, as cited in Marmor, 2015). Thomson and Marmor both agree that privacy violations are an extension of property rights i.e. the misuse of property or information without the consent of the owner is a violation of one’s rights. Marmor, however, views the right to privacy as both a property right and something more. According to Marmor (2015), people also have the right to reasonably control what information about themselves is presented to the public, and in various ways people attempt to express that control. Citizens all across the United States hang blinds and curtains in their homes, establish privacy settings on their social media accounts, and generally go about their lives revealing only the information that they want to make known. In other words, privacy is the ability to decide what personal information an individual wants others to know.

As technology develops and integrates into widespread public use, it is crucial that society keep in mind that simply because information can be accessed, does not mean that it

should be. If a person opens his or her blinds for any reason, say to let sunlight in, is that person knowingly relinquishing the right to privacy for any information that can be obtained through his or her window? This notion becomes crucial when discussing concept of liberty. Both ordinary citizens and government have both the capability and the incentive to delve into the secret lives of some people, but for government at least, this is restrained by the Fourth Amendment and the will of the people. Privacy and liberty go hand in hand; a nation that chooses to ignore the desire of citizens to retain some level of taciturnity is not one that values freedom. Behavior is altered under surveillance; dissent from the status quo, technological creativity, and group/individual anonymity would all be suppressed under a nation without sufficient privacy rights. Yes, privacy inspires people to take actions that can also be detrimental to society, but the issue goes far beyond that. Most actions taken every day are neutral, yet intimate ones, these actions are personal and emotional; the knowledge of such information offers no benefit to anyone else, but would result in a personal harm or embarrassment. The Fourth Amendment serves to protect these everyday actions, but in order to do so, it must by design, shelter some crime for the greater good of society.

### **Interpreting the Fourth Amendment**

#### **The Warrant Preference View**

*The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized (U.S. Constitution).*

The wording seems simple, but the text of the Fourth Amendment has been interpreted in various ways throughout United States history. Regardless, there are two

distinct parts of the Fourth Amendment that are the subjects of this interpretation. The first is the “warrant preference” view and the second is the “reasonableness” view, both referring to two distinct parts of the Fourth Amendment (Lee, 2011). Until recently, both of these parts pertained to mostly physical intrusions (there are a few exceptions), but “technological proliferation” has developed in such a manner that the Fourth Amendment will most certainly need to be applied in ways that the men who wrote it never imagined would be necessary (Lee, 2011).

The warrant preference portion of the Fourth Amendment indicates that law enforcement must obtain a warrant before conducting a search. In this phrase, the Fourth Amendment is to be read as “no warrants shall issue, based on probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.” This language suggests definitive requirements for a search and seizure; however, the U.S. Supreme Court has interpreted these requirements in different ways, often relying on the context of the case at hand.

In order to understand the warrant requirement one must first define probable cause. The Court has stated that probable cause is a very “practical, nontechnical conception” (*Brinegar v. United States*, 1949). The standards for probable cause vary with every situation, but Justice Rutledge set the foundation on what every situation must be built upon,

[p]robable cause exists where the facts and circumstances within their [the officers'] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed (p. 175-176).

All warrants and searches must stem from the belief that a reasonable person would have, that a crime either has been or is being committed based on the evidence presented. This evidence does not have to meet the same standards that is set within a criminal or civil trial, but must be more than mere suspicion and must be based on the “totality of the circumstances” (*Illinois v. United States*, 1983).

The necessity of a high standard for probable cause was stressed in *Beck v. Ohio* (1964), when it ruled that probable cause acts as a safeguard against discrimination by authorities. A police officer therefore, must have some reason to act in a law enforcement role. A formerly convicted felon is not to be searched simply because he or she had committed a crime in the past any more than the average citizen is to be searched in his or her home at random. To do so would be to disregard the probable cause requirement of the Fourth Amendment and the equal protection clause of the Fourteenth. It is for that reason that the Court has upheld a high standard for searches, to protect citizens from the possible discriminatory whims of law enforcement. The precedent for probable cause has become crucial with the development of technology as will be discussed later.

Beyond probable cause the Fourth Amendment requires that a warrant “supported by oath or affirmation” must be approved by a neutral magistrate (*Coolidge v New Hampshire*, 1971). The rationale of having a neutral third party approve a warrant is quite clear. There would be a conflict of interest if the authority approving a warrant was a member of the law enforcement team wanting to conduct the search or was the attorney who desires to prosecute the case. A disinterested third party also helps to ensure that sufficient probable cause is met. If a magistrate, i.e. “a reasonably prudent man or woman” is convinced that a crime has been committed or is being committed then he or she may sign off on a warrant, for the probable



cause standard has most likely been satisfied. The failure to gain the approval of a neutral magistrate is the equivalent to a warrantless search and thus invalidates the warrant and therefore the search and seizure as well. The magistrate therefore acts as barrier between the government and citizens.

*... particularly describing the place to be searched, and the persons or things to be seized*

The second distinct objective [of the Fourth Amendment] is that those searches deemed necessary should be as limited as possible. The warrant accomplishes this second objective by requiring a “particular description” of the things to be searched (*Coolidge v. New Hampshire*, 1971). The Fourth Amendment’s particularity requirement is a deliberate prohibition of a general search warrant and provides protections from violations of individual rights. General search warrants would allow a police officer to search any area that he or she believed a crime to have occurred and even those places where the probability is less likely but still possible. The particularity clause requires specification in order to prevent the use of general warrants. However the particularity requirement does not have to be so specific to specify each room that is to be searched. If an area is connected or used in conjunction with the place described in the warrant then it is reasonable for those places to be searched as well (*Steele v. United States*, 1925).

From physical intrusions to the simulation of an intrusion the Court has ruled on multiple occasions that such an act must be sanctioned with a valid warrant based on probable cause, signed by a neutral third party, and particularly describing the place to be searched, as per Fourth Amendment requirement. Much of the reasoning for this comes from

the belief that citizens are innocent until proven guilty, and to violate the rights of a suspect before his or her conviction is equivalent to violating the rights of an innocent human being.

### **The Reasonableness View**

This does not however come without any discrepancies, as few things ever do; the Court has set precedent with which they have ruled on the side of law enforcement, cases where the Court has interpreted the Fourth Amendment to separate the warrant requirement from a search. This reasonableness view breaks down the Fourth Amendment into two distinct parts; that a warrant is based on probable cause and that searches be not unreasonable, rather than a warrant based on probable cause as prerequisite for a reasonable search. Scalia wrote in his majority opinion of *Vernonia School District v. Action* (1995) that:

Where a search is undertaken by law enforcement officials to discover evidence of criminal wrongdoing, this Court has said that reasonableness generally requires the obtaining of a judicial warrant... Warrants cannot be issued, of course, without the showing of probable cause required by the Warrant Clause. But a warrant is not required to establish the reasonableness of all government searches; and when a warrant is not required (and the Warrant Clause therefore not applicable), probable cause is not invariably required either. A search unsupported by probable cause can be constitutional, we have said, “when special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable” (*Griffin v. Wisconsin*, 1987, p. 873)

In order to circumvent the warrant requirement of a search, the search must first and always be deemed reasonable. In many instances a warrantless search may be conducted under “exigent circumstances” where the opportunity for the destruction of evidence is both imminent and likely. An example often cited is that of a stopped car, which when there is reason, can be searched due to its mobility and the likelihood that evidence will be either hidden or disposed of (*Coolidge v. New Hampshire*, 1971). The doctrine of exigent circumstances does not have to be confined to cars however, any case where it is reasonable to implement a search without a warrant is valid if the situation can deem it necessary.

Precedent has required that a reasonable search may also occur when there is a threat to maintaining social order and safety. A balancing test must be used in order to determine the validity of warrantless searches. Like probable cause every case is different, but when conducting a search based on reasonableness the needs of the government or public safety must be weighed against the rights of the accused. *New Jersey v. T.L.O* (1985) and *Vernonia School District v. Acton* (1995) tell us that there are times when there is a legitimate government interest in maintaining safety and the due process rights of individuals can be truncated. If in regards to safety, a search is conducted, and requiring a warrant would be overly burdensome or potentially dangerous, then a warrant is not required and therefore neither is probable cause, thus the reasoning behind actions like the stop and frisk (*Terry v. Ohio*, 1968).

The test for a reasonable search is two pronged: “first a search has to be justified at its inception, second, one must determine whether the search as actually conducted was reasonably related in scope to the circumstances which justified the interference in the first

place,” (*New Jersey v T.L.O.*, 1985). As with probable cause the reasonableness test does not require “absolute certainty”, but in contrast, a search solely based on the reasonableness view is a lower standard of due process and also conveys a higher risk of potential violation than one conducted with a warrant. The safeguards of the reasonableness test are the balancing act that must occur and the two pronged test of justification and scope, but a search based on reasonableness could be conducted without ever having met them since there is no third party involved to stop it. The potential for error here is more real. A violation from a search can only be resolved in a reactionary manner via the court system. Whereas a search based on a warrant, probable cause, and a magistrate are more preventative measures to search violations. However both types of searches have been constitutionally upheld by the Courts, due to the varying interpretations of the Fourth Amendment.

### **The Right to Privacy: a Development**

The Court has expanded Fourth Amendment protections to any place that an individual has a reasonable expectation of privacy, that is to say that an individual is protected by the Fourth Amendment warrant requirement when he or she is performing an action that is not open to public intrusion.

The Court has adjusted its views on what exactly that expectation of privacy entails. In the 1920s the Court ruled that tapping personal phone lines did not violate the Fourth Amendment. The court adhered to a more textualist approach to the Amendment and interpreted it to mean exactly what it says, “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated...” The Court believed that a phone call was the same as projecting a conversation

out into the world, and since no physical intrusion is necessary to tap a phone line, it was not a violation of the Fourth Amendment. The Court placed the burden of protecting intangible evidence such as a conversation on the citizens, rather limiting the ability of the government to intrude through the expansion of the Fourth Amendment (*Olmstead v United States*, 1928).

This position on the right to privacy was affirmed in a similar case in 1942 when the Court ruled that listening to a conversation through the use of a detectaphone was not an interception of a private conversation, simply because it merely magnified the volume of the sound from its source, which is as nonintrusive as hearing a loud conversation that is going on in the same room (*Goldman v. United States*, 1942). Since neither of these cases were considered searches the Fourth Amendment did not apply and therefore neither did its requirements for probable cause or reasonableness.

Now let us consider the right to privacy in which a physical intrusion into a house was made without a search warrant but legitimately based on reason. In *Warden v. Hayden* (1967) police entered a residence and seized materials that were used to identify the suspect and weapons used during the alleged robbery without a warrant. The Court did not object to the validity of the search due to the reasoning that the officers had in searching the particular suspect and the exigent and dangerous circumstances surrounding the police conducting it. This case publicized the paradigm shift in the meaning of the Fourth Amendment however, rather than a protection of property, the Fourth Amendment had come to be seen as protection of privacy and the case also invalidated the tangible evidence doctrine for seizures.

At this point the Court has interpreted the Fourth Amendment to guarantee privacy rights to individuals in, for the most part, a more literal sense i.e. homes, papers, etc. But the

Court has since then (and it started in *Warden v. Hayden*, 1967) expanded that right to anywhere that an individual has a “reasonable expectation of privacy.” This could be a phone booth, office, and many other places where one does not expect unwelcomed intrusions by others. The Court has also overturned its previously held beliefs that a physical intrusion was the only kind of intrusion that the Fourth Amendment was intended to prohibit. This relatively new take on the Fourth Amendment has expanded privacy outside of the home; the protection of the Amendment is not property oriented or location focused, it is fixated on the privacy of individuals no matter where they are. Any information that is made public is not able to be defended under the aegis of the Fourth Amendment even if it were done so in the home, which has for a long time been regarded as a sacred place of individual privacy. Posting something to Facebook or any other social media from the bedroom, or throwing incriminating evidence into a trashcan for city pick up would clearly not be subject to Fourth Amendment protection any more than would being caught with a handful of drugs in a public park be protected. But having a conversation in what was intended and perceived to be as private space is protected. Katz used a phone booth; he had a reasonable expectation that his conversations would not be overheard, and had technology not been involved the incriminating evidence would have never been discovered (*Katz v. United States*, 1967). This decision implies a change in mindset of the Court from when *Olmstead* and *Goldman* were decided and would mean that an office discussion or a phone conversation at one’s home are both expected places of privacy. The search in *Katz v. United States* (1967) was done so on the basis of the reasonableness aspect of the Fourth Amendment, there was a strong suspicion that a crime was being committed, yet the Court did not uphold the search due to the fact that a warrant could have been obtained, validating the search, but was not and therefore it was

illegitimate even though authorities had reasonable suspicion; there were no exigent or dangerous circumstances in this case so the Court sided with the warrant preference view. This reflected the fact that searches based solely on reasonable suspicion are far more likely to violate individual rights, while searches made via a warrant based on probable cause with the signature of a magistrate acts as a barrier between the accused and the accuser. This and the expansion of the right to privacy to any presumed private places have transferred the individual protections from searches and seizures from specific places to the individual.

These beliefs were also expressed in the ruling of *United States v. United States District Court* (1972). Here another balancing act similar to that in *New Jersey v. T.L.O.* (1985) must be exercised, the responsibility of the government to defend itself and the rights of individuals are weighed against each other. In this case the Court upheld the warrant preference view of the Fourth Amendment again by stating that the warrant requirement is a part of the Fourth Amendment and that it should be a necessary part of law enforcement, not “dead language that can simply be weighed against the efficiency of the police.” This balancing is done by convincing a neutral magistrate that there is sufficient evidence to violate someone’s rights. The Court confirmed that the warrant requirement can only be violated when there is reason to believe that there are exigent or dangerous circumstances as described in previous cases such as *Katz*, *Terry*, *TLO*, etc.

In *Kyllo v United States* (2001) it was determined that the tangible goods doctrine which was turned down in *Warden v. Hayden* (1967) did not only apply to conversations. The use of thermal imaging technology to detect heat emissions from a home was declared a search, because it was information that could not have been obtained without an active

inspection of the home with specialized technology. This ruling once again broadened the scope as to what is protected under the Fourth Amendment. It was a reaffirmation that the Fourth Amendment is a protection of the person's rights, and is not limited to the property that he or she owns, conversations, or physical intrusions. The model of the Court in recent years has been an emphasis of the warrant preference view based on the facts of each specific case, except in extreme situations where reasonableness is necessary to the safety of the parties involved. The implied right to privacy has been expanding incrementally despite a few setbacks caused by a disconnect between interpretations of what a search is and the ability of informative yet not physically intrusive technology.

### **Searches with a Warrant**

In most ordinary situations, a search requires that a warrant be issued. As discussed previously a warranted search is one that is based on probable cause, signed by a neutral magistrate, and particularly describing the places to be searched. Probable cause being the first safeguard for citizens means that the probative value of the evidence, does not have to be beyond a reasonable doubt, but must lead a reasonable individual to believe that a crime has been or is being committed.

The search warrant satisfies a higher standard of due process that protects from unconstitutional intrusions. Early on in the nation's history the Court has demanded the use of a warrant in searches both physical and sometimes even non-physical in nature (see *Boyd v. United States*, 1886). In 1914 the Court ruled in *Weeks v. United States*, that evidence obtained without a warrant from a person's home could not be used as evidence in a trial, and also concluded that the warrant requirement was not just a portion of the Constitution that



could be applied at the convenience of law enforcement; setting a resolute preference for obtaining a warrant in most situations.

These decisions have upheld the warrant requirement in normal circumstances and upheld the exclusionary rule as a remedy to violations thereof; precedent has also enforced the constitutional conditions that a warrant must meet. See *Brinegar v. The United States*, 1949, *Illinois v. The United States*, 1983, *Coolidge v New Hampshire*, 1971, and *Steele v. United States*, 1925. It should be mentioned that the Court's solution of the exclusionary rule in *Boyd v. United States* (1886), *Weeks v. United States* (1914), and *Mapp v. Ohio* (1961) against search violations is an example of the strong preference for search warrants.

There are other concepts however that are more implicit than those of probable cause, a neutral magistrate, and particularity. For example the Fourth Amendment states nothing about the disclosure of crucial information to magistrates when they are weighing probable cause. It merely requires that they be disinterested. Relevant facts such as the use of an informant rather than personal observation of a crime have been determined to require full disclosure to a magistrate when applying for a warrant (*Aguilar v Texas*, 1983). This is not the only situation however in which such information would be expressed. The case law requires that any "underlying circumstance" which the affiant utilized to draw his or her conclusion must be made known in the affidavit for a search warrant. This changes the definition of a neutral magistrate, to be both unbiased as well as informed before a search can be valid.

*Johnson v United States* (1948) further established a state where "police are under the law not one where they are the law." Police officers cannot use there positon of power to convince a suspect to allow admittance into a home "under the color of authority." Even

though admittance into the home or other expected places of privacy would then allow the officer to reasonably deduce that a crime had been committed and to make an arrest, thus allowing for a subsequent search due to incident without ever needing to obtain a warrant. By allowing police officers to use their authority to trick or coerce someone into unknowingly giving up their rights of Fourth Amendment protections, the very amendment is being violated, and the arrest itself would be invalid also nullifying the search that followed. A search warrant however, properly obtained, would justify most actions taken.

Another example of the Fourth Amendment's silences is in rental property. Seeing that the property is owned by one and occupied by another, it is not too outrageous to believe that a landlord may allow police to search a home, but according to the ruling in *Chapman v. United States* (1961) that is not the case. The Fourth Amendment offers protections of the home from the discretion of police officers (*Johnson v. United States*, 1948) and landlords, unless otherwise agreed to in the rental contract (*Chapman v. United States*, 1961). Private parties are not to be used as a loophole for government enforcement to circumvent the protections that the warrant requirement offers.

*United States v. Ventresca* (1965), like *Johnson* and *Chapman*, tells us that even in questionable cases of probable cause, a search with a warrant is more likely to be upheld than one without a warrant. This decision confirmed the warrant preference that had been established in previous cases. The deference to this requirement in most situations protects from hurried and biased decisions of police officers, it is not a means of stymieing police efficiency and is usually the preferred process (Lafave, 2012).

The Courts have routinely upheld the requirement of warrants in most situations. It would therefore be more practical to say that the Fourth Amendment founded on both the literal text requirements and the implied meaning interpreted from case law, requires that warrants be based on probable cause, which must be weighed and signed by a neutral and well informed magistrate, particularly describing the places to be searched and the things to be seized. Every case where there is no threat of exigent circumstances and obtaining a warrant would not allow for the covering up of a crime (*Aguilar v. Texas*, 1983; *Johnson v. United States* 1948; and *Chapman v. United States* 1961), and in any instances where the necessity of a warrant is questionable, a warrant is required (*Ventresca v. United States* 1965). The Court made it clear in *Johnson* that “when the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or government enforcement agent”; reiterating the belief that a warrant obtaining all of the above mentioned requirements be sought out in most situations. Since this a rule by which enforcement agents must follow, exceptions do exist. Some have already been mentioned previously, but the preference for obtaining a valid warrant prior to a search however, is strong, usually required, and deeply rooted in precedent.

### **Searches without a Warrant**

Not every search requires a warrant, but special circumstances must exist when a warrant is not required to perform a legitimate search. The U.S. Supreme Court has authorized warrantless searches by police officers on many occasions, and this chapter examines some of the more common types of warrantless searches. The cornerstone of warrantless searches was founded in 1925 with the Carroll Rule, which requires that probable cause be established before conducting a search in the absence of a warrant (*Carroll v.*

*United States*, 1925). This case involved the search of vehicles and resulted in the Court's statement that the requirements to substantiate a warrantless search are quite similar to the requirements that justify the granting of a search warrant. A police officer must have good reason to believe that a crime has been or is being committed and also believe that the time it would take to obtain a warrant would jeopardize safety or evidence. In other words, it has to be believed that if law enforcement had the time to apply for a warrant, the request would have been granted.

Jeopardizing safety or evidence provides law enforcement the authority to conduct warrantless searches. These *exigent circumstances* were articulated in *Minnesota v. Olson* (1990), in which the Court ruled that the following exigent circumstances exist: imminent destruction of evidence, hot pursuit of a dangerous offender, public safety, and rescue efforts. Due to emergency situations, it is not feasible for police to obtain a warrant; thus, the Court has upheld warrantless searches and seizures in these types of circumstances.

A common type of warrantless search involves searches of automobiles. In *Carroll v. United States* (1925), there was reason to believe that the suspects were participating in illegal activity. The suspects were known for distributing alcohol during the prohibition era. The police officers could have applied for a warrant; they had enough reasonable suspicion that they would have most likely received one. However, under the circumstances, if they had applied for a search warrant, the car could have fled the scene, which would have allowed the suspects to dispose of the evidence. Other cases similar to *Carroll* have been supported by the Court and have even expanded the authority of police to search every aspect of a vehicle as if they actually had a warrant. In *United States v. Ross* (1982), the Court held that, if a police officer has probable cause to believe evidence of a crime is in an automobile,

the officer may search “as broad as one that could be authorized by a magistrate issuing a warrant.” This was upheld again in *California v. Acevedo* (1991).

Another type of warrantless search is a stop and frisk. In *Terry v. Ohio* (1968), a police officer stopped a suspicious person in the street and proceeded to frisk the person when he did not respond to police questioning. The Court ruled that, when there is reason to suspect someone of a crime, that very reason is also enough to stop an individual for questioning. If questioning does not dispel a police officer’s fears, then a frisk of the individual can ensue.

Police officers can also search incident to a lawful arrest. This allows police to search an individual for evidence as well as weapons. The only restrictions on this type of warrantless search are that it must be contemporaneous to the arrest (at the same time or immediately afterward) and that it must be within the wingspan of the detained individual. Both of these restrictions ensure that police do not conduct “fishing expeditions” beyond a legal arrest (see *Chimel v. California*, 1969).

Individuals can consent to a police search as well. As long as an individual gives voluntary consent to search, police are able to do so without a warrant. Individuals can revoke consent at any time. One of the aspects of consent searches is who has the authority to consent to a search. The Court has upheld parents consenting to a search of a child’s room, spousal consent, and employer consent. The Court defined this third party consent rule in *Illinois v. Rodriguez* (1990).

The Court has also upheld warrantless searches and seizures in cases involving plain view, open fields, and abandonment. With plain view, if police have a right to be where they

are, they can seize illegal items that are in plain view. This usually occurs when police are executing a search warrant at an individual's home and find other illegal evidence, not included in the warrant, in plain view. These types of searches and seizures are dictated by *Horton v. California* (1990)

Open fields and abandonment constitute situations in which evidence is found in a public place with no obvious possession interest in place. In open fields, these areas are accessible to the public and, therefore, police as well. For abandoned property, individuals no longer have any privacy interest once their belongings are abandoned. As such, anyone, including police, are able to search it (see *Hester v. United States*, 1924; *California v. Greenwood*, 1988).

As seen, the U.S. Supreme Court has authorized a number of different types of searches by police without a warrant. For these searches, a number of justifications have been offered, from public safety to plain view. Regardless of the reasons, it is evident that the Court has moved beyond the words of the Fourth Amendment and authorized searches not only without a warrant, but also without probable cause. This willingness of the Court to alter the requirements of the Fourth Amendment provides insight to any possible decisions the Court will make about the use of technology in searches and seizures.

### **Technology and the Fourth Amendment**

#### **Katz v. United States (1967)**

*Olmstead v. United States* (1928) and *Goldman v. United States* (1942) placed the burden of protecting intangible evidence on the citizen. The Court reversed this view of the

Fourth Amendment in *Silverman v United States* (1961), when the Court interpreted Fourth Amendment protections to be people oriented, and not tied to any one location, and the Court concluded that a violation did not require physical entry into a private space.

The expansion that Fourth Amendment protections covered not only a person, but also intangible evidence related to a person, was reaffirmed in 1967 (*Katz v. United States*, 1967). The *Katz* case is interesting because it very strongly laid out the expectation that law enforcement retrieve a warrant before conducting a search. The Court emphasized that, when a person believes that he has an expectation of privacy, and when society recognizes that expectation, he is, under most circumstances, constitutionally protected: “[w]hat a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected” (p. 352).

In the case of *Katz*, the phrase “constitutionally protected *area*” was deemed to be misleading, as the Constitution does not protect places, but people from unreasonable searches and seizures. For *Katz*, it was the confines of a phone booth where he expected to have a private conversation. The FBI positioned a listening device just outside of the phone booth, and even took precaution to listen in on only the portions of *Katz*’s conversations pertaining to the crime. The state argued that, since there was no physical intrusion of the phone booth, there was no search. In the majority opinion, the Court offered similar conclusions that it presented in *Silverman* (1961) -- if there is reason to believe that a search needs to be made, but the necessity of a warrant is even somewhat questionable, then it is more prudent to obtain a warrant. Not doing so places the security from searches with the

impulses of law enforcement, who may be more emotionally involved than a neutral third party, regardless of whether or not a physical intrusion is made.

A case like *Katz* begs the question of whether or not sensory enhancing technology is an appropriate tool to conduct a search. In most situations employing a listening device does not make the police officer's environment any safer and, in the average search, it does not generate any tactical advantage, yet the Court sometimes upholds the use of technology in the absence of a warrant if that technology was a substitute for human actions. For *Katz*, a warrant was thought to be necessary, because the technology was evidence capturing, and obtained the intimate details of a conversation that could have only been done otherwise with a physical intrusion. This requirement does not hold true for some of the following cases; for the Court, appropriate technology and warrant requirements tend to operate on separate continuums that do not always align.

### **Smith v. Maryland (1979)**

One such case where the warrant requirement and the use of information gathering technology do not correlate is *Smith v. Maryland* (1979). At the request of law enforcement, a telephone company installed a pen register, a device to collect the numbers that a customer dials, to track the calls of a suspected robber. The question before the Court was whether or not the petitioner invoking Fourth Amendment protections had a legitimate claim to privacy over the numbers that he was dialing, not just the content of his conversations. As in *Katz*, the warrant requirement revolved around whether or not the petitioner and society believed in the same expectation of privacy (*Katz v. United States* 1967). The second issue revolving



around this case was whether or not the pen register data collection was an appropriate use of technology.

The Court had determined in *Katz* that the content of one's speech tends to be a private matter; however the contents of speech were not obtained in *Smith*. The numbers dialed were not considered to be a private matter because dialed numbers are turned over to a third party - i.e. the telephone company - for billing purposes. Under *United States v. Miller* (1976), *Hoffa v. United States* (1966), and *Lopez v. United States* (1963) any information turned over to a third party ceases to be private because the parties involved have "assumed the risk of disclosure."

The type of technology involved here was frequently used by telephone companies regardless of police requests; evidence of this appears in the monthly bill of customers. This knowledge that telephone companies collect the numbers dialed using certain technologies (i.e. human telephone operators had become obsolete) was common and, thus, any social expectation of privacy over the numbers that one dials on a phone were rejected.

The issue does not seem to be the technology utilized in this case, but the expectation of privacy that one has when the technology is used. In this case, the pen register served as a substitute for a human operator, who would have physically collected the phone numbers anyway. The expectation of privacy, like technology and warrants, also seems to operate on separate continuums: personal expectation of privacy and social acceptance of that expectation. The question that must be asked is, which one should outweigh the other? Does society's standard set the meaning of the Fourth Amendment or is it determined by the

implied meaning of the Amendment itself? And is there a limit to technological substitutions for human activities?

### **California v Ciraolo (1986)**

Another case that appeared before the Court involved aerial surveillance. *California v Ciraolo* (1986) concluded that aerial observations that could be employed by the common person was not an unreasonable search; the Court determined that it equates to visual observation. The Court reasoned that, if criminal activity can be seen from a publicly accessible vantage point, then it did not matter if the crime was located within the curtilage of the home, it then becomes plain view, regardless of the motivation of law enforcement.

Ciraolo was growing marijuana around his house and constructed a tall fence in order to prevent those at ground level from seeing his activity. His intention for privacy at ground level did not extend to observance from above. When police were informed that Ciraolo may have been growing marijuana they boarded a plane and flew over the property. With no other special equipment other than the plane and a camera, the police were able to identify the plants as marijuana, and used that as cause to obtain a warrant for his arrest. It did not matter, according to the Court, that the intention of the observational flight was a search, rather than an inadvertent discovery.

As in *Katz* and *Smith*, the second question that defines the reasonable expectation of privacy was examined. According to the Court, societal expectations of privacy and the petitioner's did not match, thus answering the question of whose expectation carries more weight. Ciraolo believed that his property was shielded from public view, and it was from ground level, yet the Court determined that it was not, in fact, shielded from view. The Court

ruled in favor of law enforcement because simple visual observation is in fact no *search* even if the intended use of the technology is for a search. Relatedly, the Court reasoned that Ciraolo's backyard was accessible to the public via airspace; therefore, police did not conduct an unreasonable search since any member of the public could view the backyard from the air.

### **Dow Chemical Company v. United States (1986)**

Another example of an aerial search is found in *Dow Chemical Company v. United States* (1986). The Environmental Protection Agency (EPA) conducted an on-site inspection of the Chemical Company without notice and without obtaining an administrative warrant. The EPA engaged in aerial photography of Dow's facilities. Similar to *Ciraolo*, the Court held that, since the technology involved was publicly available, there was no unreasonable search and seizure. Therefore, the Fourth Amendment could not be invoked by the Chemical Company.

The technology involved in this case was a common form of technology often used in mapmaking, and any person who had access to a plane and a camera could have replicated the images that were taken. This case falls along the same lines as *Smith* and *Ciraolo*, and confirmed the precedent that if the technology used to conduct a search is easily accessible to the general public, then police can use it to conduct a search that does not apply to the Fourth Amendment. This implies that no warrant is necessary for a *search* using common technology. This case also implies that law enforcement does not need any statutory provision authorizing them to use common technology to conduct their enforcement obligations.

The Court did place a possible restriction on the use of technology for surveillance purposes. The use of “highly sophisticated surveillance equipment not generally available to the public, such as satellite technology” might require a warrant (p. 239). It appears that the Court had adopted the belief that common technology most likely will not provide any intimate details that could lead to an invasion of privacy. Again, technology is not the issue; it is the level of accessibility that surrounds technology that is the concern of the Court.

### **Kyllo v. United States (2001)**

Public access to technology appears to be the turning point in the previous cases. *Kyllo v. United States* (2001) is an instance where technology that was not available to the public was used to search an individual’s home. Law enforcement was informed that Kyllo was growing marijuana inside his house and the Department of the Interior (DOI) utilized a thermal imager to determine the levels of heat radiating from different areas of the residence. Although no intimate details were obtained, just levels of heat, the question is whether or not this was a search. The enforcement agents had obtained electric bills and could have determined electricity use based on that, which, according to *Smith* would have been acceptable, but the use of a thermal imager without a warrant was deemed unreasonable.

In most cases, the warrantless search of a home is going to be struck down by the Court; the problem that remains is defining what a search is. Without the use of the thermal imager, the DOI would not have been able to determine where the heat was located or how constant the levels of heat were, even with the use of electric bills. The Fourth Amendment protects citizens from an unreasonable search of a home, and the Court has determined the

use of technology that is not easily accessible to the public to be a search, and, therefore, struck down the use of the thermal imager without a warrant.

### **United States v. Jones (2012)**

With emerging technology, sometimes law enforcement outpaces the courts when a search or seizure is conducted. In *United States v. Jones* (2012), law enforcement utilized GPS technology attached to suspected drug dealer Jones's car in order to track his movements. The Government contended that, because the vehicle that was tracked was in plain sight and made use of public roads, the technology that was used was just a substitute for visual observation of a place where Jones had no expectation of privacy, like the use of a pen register. The government argued that the GPS device was the same as a "tail," in that the government chose to use a more efficient mechanism of tracking Jones instead of employing dozens of law enforcement agents to follow him.

While visual observation and reasonable expectation have been consistently held up by the Courts, the Court found that *Katz* did not confine the Fourth Amendment to places that have a reasonable expectation, but merely expanded the protections from "persons, houses, papers, and effects." "Effects" are clearly protected by the wording of the Fourth Amendment itself and no standard or doctrine can deny or circumvent that protection without good reason.

The Court struck down the tracking of a vehicle using GPS technology as a substitute for visual observation. Whether this was because the technology was too sophisticated or because a vehicle is simply never to be followed using tracking technology without a warrant is unclear. The one thing that remains constant is that the Court has not clarified the

ambiguities of technology as a substitution for physical observation. In *Smith*, a pen register was upheld as a substitution for an operator, and *Ciraolo* and *Dow Jones Chemical Company* both allowed the use of cameras and an airplane, while warrants were required for *Katz*, *Kyllo*, and *Jones*.

### **Bigger Issues**

If an individual's expectation of privacy is predicated on society's concurrence about that expectation, then, as younger generation's expectation of privacy wanes, so will an individual's expectation of privacy. The use of social media, the internet, and smart phones are all tools that people use every day that may transfer information to the public or to a third party without active, informed consent. This is only one small portion of the issue that technological proliferation poses. What about other activities that were previously considered private by older generations, but are not considered so by younger generations, such as travel, at home activities, etc.? Even thermal imaging technology has become available to the public; one can be purchased on Amazon for less than \$300.00. It appears that Fourth Amendment loopholes evolve with time.

If the Court continues to uphold the visual observation standard as it has thus far, with the use of assisting technology that is available to the general public, then, as technology which is available to the general public becomes more advanced and sophisticated, the protections of the Fourth Amendment will dissolve. If *Jones* confirms that *Katz* adds to Fourth Amendment and common law protections, not limits them, the question then becomes, what constitutes a search? If visual observation or the use of common technology is not comparable to a search, then what about the use of drones or any other sophisticated

technology that becomes available to the public, or any technology that allows both the average person or the police to have a more intimate look into a person's home or office? Is it just a substitute for visual observation, like a pair of binoculars or a public vantage point, or is it something more? People cannot prevent others from using advancing technology that is available to the public, which seemed to have been the one way to prove that a person has an expectation of privacy. In light of the technological advancements within reach of the public, the Court and legislatures will find it necessary to redefine what a search is.

### **Current Issues: Drones**

Unmanned Aerial Vehicles (UAVs), originally intended for military use, have now expanded to the market for public purchase at stores such as Radio Shack, Walmart, eBay, and many other locations. The price ranges from \$15.49 for a small Pocket Drone Quadcopter ([www.bangood.com](http://www.bangood.com)), which can only fly for five to six minutes, to the xFold Dragon X12 RTF U11 Drone, which costs \$31,721.82, and is an FAA certified aircraft which can carry up to two professional cameras for aerial cinematography ([www.adorama.com](http://www.adorama.com)). Drones like the Firestorm Smart Drone can be purchased for merely one-hundred dollars, have video recording capabilities, and can even be flown at night ([www.virventures.com](http://www.virventures.com)).

Court precedent, the increased public accessibility of technology, and the advancing capabilities of such equipment create a dilemma for those seeking to strike a balance between technology, legitimate searches, and the right to privacy. There are many ways for citizens to purchase UAVs, many of which come equipped with cameras and video capturing technology. Because drones have become accessible to the public through innovation and

economic forces, they now comply with the Court's stance on what is considered a non-invasive technology in relation to the Fourth Amendment.

If "public accessibility", the "technology as a replacement", and the "reasonable expectation" arguments continue to dominate the legal system, drones that are photo or video enabled could potentially be used by police officers without restriction, in a fashion similar to aerial traffic surveillance, as could other types of technology. If it is perfectly acceptable to use technology as a replacement for a publicly accessible vantage point, then police officers could conduct a search of one's property without it actually being considered a Fourth Amendment issue. This, coupled with the fact that societal expectations of privacy seems to trump personal expectations (*Katz v. United States*, 1967), could mean that the reasonable expectation of privacy both in one's home and in the immediate curtilage could vanish, as both citizens and law enforcement are allowed to operate a drone over any navigable airspace as a means of entertainment or warrantless surveillance, supported by *California v. Ciraolo* (1986), *Dow Jones Chemical Company v. United States* (1986), and *Kyllo v. United States* (2001).

Drones, however, offer several new issues that must be discussed. First, they can fly at different altitudes than airplanes or helicopters and thus offer glimpses into private property that may have been impossible with traditional means of aerial surveillance. What then should be considered navigable airspace? Second, drones may be trespassing onto private property when flying over various properties. Do property rights extend above the surface of the property or is the airspace above surface property a completely separate asset? If so, to whom does it belong and can it be purchased like surface and subsurface rights? Third, precedent establishes that it is the responsibility of the individual to ensure that he or



she has a reasonable expectation of privacy, as concluded in *California v. Ciraolo* (1986) and *Dow Chemical Company v. United States* (1986). Do these advances in technology and the increased potential for fishing expeditions by police officers create an overly burdensome expectation on citizens to protect their own privacy? Does the Court need to reexamine the rationale behind the decisions in *Ciraolo*, *Dow Chemical Company*, and *Kyllo*? If not, where will the erosion of privacy stop?

### **Arguments for Warrantless Use of Drones**

In his testimony before the United States House of Representatives Committee on the Judiciary Subcommittee on Crime, Terrorism, Homeland Security and Investigations, Gregory S. McNeal, an associate professor of law at Pepperdine University, argued that there should be no “blanket, technology centric” approach to legislation regarding the protection of privacy (McNeal Testimony, 2013; McGlynn, 2013). He argues that drones are no different than other aircraft, patrol cars, or public vantage points, none of which require a warrant based on common law precedent. McNeal likens the use of drones to flying an airplane or routine car patrols as a means to obtain the probable cause necessary for an arrest or search warrant.

In his testimony, McNeal argues against the implementation of broadly worded statutes restricting drone use from evidence capturing in the absence of a warrant. He states that the inadvertent observation of a crime during non-law enforcement operations should be protected and admissible in a trial. He discourages both “drone centric” legislation and even warrant based approaches to limit drone use, and encourages legislation on surveillance transparency, record keeping, and accountability.

Although not explicitly mentioned in the McNeal testimony, it could be argued that drones also offer a variety of other benefits for both law enforcement and taxpayers. Drones

are cheaper to operate than a multi-person surveillance operation or other forms of aerial observation. They are less likely to be detected by criminals and, thus, increase the level of safety for law enforcement.

McNeal's testimony implies that drones are simply electronic substitutes for physical observation, as seen in *Smith v. Maryland* (1979) and other subsequent cases. It could also be argued that it is highly likely that information obtained via a drone could have also been obtained without a warrant through other, more costly means.

### **Arguments for “Drone Centric” Warrant Requirements**

Proponents who argue that police officers should always obtain a warrant before using a drone posit four main issues: (1) the risk of abuse is high; (2) people become more susceptible to privacy breaches; (3) there is currently no legal framework governing drone use; (4) public trust in government is low (Eaves, 2013; Stepanovich Testimony, 2012).

Amie Stepanovich, a member of the Electronic Privacy Information Center (EPIC), argues that drone technology is in fact different from other forms of surveillance technology because it has the potential for constant monitoring; drones also offer the potential to utilize facial recognition software and create an unnecessary database of citizens, regardless of whether or not they have committed a crime (McGlynn, 2013; Stepanovich Testimony, 2012). The American Civil Liberties Union (ACLU), another proponent of drone centric warrant requirements, believes that the interconnectedness of drone technology could provide for the mass tracking of people by the government and also allow for the inadvertent collection of data which could be used in criminal proceedings (ACLU). Because of the low cost of operating a drone and the potential for imagery, it could be argued that police would

have very little incentive to resist the urge to utilize drones for even low profile cases or more worrisome, fishing expeditions. Unrestricted use by law enforcement would come at the cost of privacy to citizens, while in comparison, law enforcement would see relatively little cost.

The ACLU realizes that the stealth nature of drones allows for unnoticed surveillance through windows and various other intrusions of privacy (ACLU). Both Stepanovich and the ACLU believe that current case law creates a loophole for law enforcement to utilize such technology to conduct in what in almost every aspect is a search, but is not considered so according to case law.

Additionally, American trust in government is low. According to a Gallup poll in 2014, 55% of Americans distrust their government on international or domestic issues (Gallup Poll, 2014). With regard to the use of drones by the government, in 2012, Seattle Police intended to use drones for routine policing activities; the Seattle Police Department had received a grant from the Department of Homeland Security and had purchased the UAVs. However, the council meetings that were held in 2013 to pass ordinances to regulate drone use revealed the intense public backlash against the very thought of police officers utilizing drones and the city had to abandon the idea (McGlynn 2013; The Seattle Times 2013). A poll by Monmouth University in 2012 revealed that, while “80% of Americans support the use of drones in search and rescue operations, 67% support drone use for tracking criminals, and 64% support searching for illegal immigrants via drone technology,” Americans do not support the use of drones for issues such as traffic violations. In fact, “67% of Americans oppose drone use in such a constant manner. Sixty four percent of the population is either very concerned or somewhat concerned about the drone-privacy dilemma and only 15% of Americans are not concerned at all about the potential for diminishing

privacy rights should law enforcement begin using UAV's on a regular basis" (Murray, 2012).

### **FAA Regulations Regarding Drones**

The FAA Modernization and Reform Act of 2012, Subtitle B, tasked the FAA with piloting a program to implement drone use into U.S. airways, issue guidance for the operation of public drones, and establish a drone authorization process by December 31, 2015. This Act was carried out and dictates that the FAA plan for the use of drones to promote public safety, but stops short of providing any substantial privacy protections from government agencies. Although the FAA grants the authority to use drones – known as Certificates of Authorization (COA) -- it cannot, however, regulate *how* law enforcement may use drones in pursuit of criminal activity (Galizio, 2015).

To be in compliance with the law, the FAA has proposed regulations for drone use. If the FAA passes these regulations, then drones used on the domestic front must weigh less than fifty five pounds, may only operate within daylight hours and within sight of the operator, must fly less than or equal to 500 feet above ground level, must not exceed 100 mph, must be operated by someone who is both at least seventeen years of age, has passed the FAA knowledge test, and must have their drone registered with the FAA (NCSL, 2016)

### **Notable State Legislation Regarding Drones**

Twenty states have passed legislation concerning drones, while five other states have adopted resolutions related to drones (NCSL, 2016). Many of the states that have enacted legislation regulating how public agencies may use drones in day to day activities require that police must obtain a warrant prior to utilizing the technology. Most of these states do allow

for exceptions to the drone specific warrant requirement for reasonable suspicion accompanied with exigent circumstances, danger to the life of an individual, search and rescue missions, terrorist threats, regulatory activities for industry compliance, mapping and GIS duties, etc.

## **Florida**

Florida state statute Title XLVII Chapter 934.50 regulates state searches and seizures using drone technology. This act, commonly known as the “Freedom from Unwarranted Surveillance Act,” prohibits the use of drones by law enforcement agencies to gather evidence or other information. The statute also prevents private and public drones from collecting images of privately owned real property or of the person living at such property “with the intent to conduct surveillance on the individual or property captured in the image.” What makes this statute unique is that it also explicitly defines a person’s reasonable expectation of privacy in regards to drone use: “[A person] on his or her privately owned real property if he or she is not observable by persons located at ground level in a place where they have a legal right to be, regardless of whether he or she is observable from the air with the use of a drone.” This is unique, as it legally identifies a difference between two types of aerial surveillance – drone surveillance and traditional aerial surveillance.

## **Illinois**

Illinois Public Act 098-0569 is a notable piece of drone legislation because it created an Unmanned Aerial Surveillance (UAS) Oversight Task Force, which is designed to study and make recommendations for the “operation, regulation, and usage of drone technology.” The task force is appointed by the Governor and must represent twenty two stakeholders,

some of which include the Division of Aeronautics, the State Police Department, the Department of Natural Resources, the Department of Agriculture, The Department of Commerce and Economic Opportunity, and a representative from the Attorney General's Office. The job of the task force is to create rules and regulations regarding both public and private use of drones within the state; it also receives support from the Department of Transportation. The task force, however, is set to expire in September of 2016.

## **Nevada**

Nevada Assembly Bill 239 establishes limitations on the use of drones by law enforcement and other public agencies and requires the creation of a statewide registry for all drones operated by the public sector, but only to the extent that funding is available. The law also requires that certain information relating to government use of drones be provided to the state legislature and requires that the Department of Public Safety regulate legal purposes and use of drones along with civil and criminal penalties for any violations thereof.

## **Utah**

Utah House Bill 296 necessitates testing requirements for a law enforcement agency's use of an unmanned aircraft system and also implements law enforcement UAV annual reporting requirements for the number of times a UAV was operated by a law enforcement agency, the number of times a drone aided in a criminal investigation, a description of how the UAV was helpful in each situation, the type of data collected, data collected by non-law enforcement persons, and the total cost of drone operations each year.

The training section of Utah House Bill 296 does not pertain to education on the ethics of drone use, when it is appropriate to operate a drone with and without a warrant, or

any other sort of decision making exercises, but only refers to training on how to physically operate a drone.

### **Case Law Regarding Domestic Drone Use**

In 2012, a North Dakota district court convicted a man of terrorizing, preventing arrest, and failing to comply with the law for stray animals. Police officers arrested Rodney Brossart on his own property after obtaining a warrant to launch a predator drone in order to identify his exact location (Koebler, 2012; *State v. Brossart*, 2015). It has been said that this is the first case where, within the borders of the United States, law enforcement has used unmanned aerial surveillance in order to locate and convict a suspect.

According to Koebler (2012), local law enforcement received approval from a magistrate and the Department of Homeland Security to operate the predator drone, and this was upheld by the trial court and never mentioned in any of the appellate cases that followed. Brossart never brought a challenge to the use of a drone before the appellate court, most likely for two reasons. First, a warrant was obtained on probable cause before the drone was used. Law enforcement knew that Brossart was illegally keeping cattle that did not belong to him, he had made legitimate threats against law enforcement, and had been involved in a sixteen hour standoff with the police (Koebler 2012). Second, Brossart never petitioned the appellate court to overturn the trial court's ruling for an invasion of privacy via drone use; therefore, the appellate court could not make a ruling on the legality of domestic drone use. It should be noted that, even if he had, precedent may not have worked in his favor anyway.

This case is important, however, in setting a precedent of its own. Should other courts lean on this decision for future cases, then law enforcement will be able to operate drones in

pursuit of criminal activity. However, other courts may only allow for such tactics under the threat of terrorism, or although less likely, rule against drone use altogether as being too invasive.

### **Argument**

This ambiguity created by the gaps in case law and the lack of legislation means that current safeguards are not adequate to ensure privacy, which has resulted in calls for Congress and state legislatures to establish surveillance protections. The FAA was instructed to create a plan for integrating the use of both private and government drones safely into U.S. airspace by 2015, but there has been no successful federal movement to regulate how drones may be utilized by government agencies. Therefore, either Congress, state legislatures, or the courts need to make the decision to restrict the use of drone technology for law enforcement purposes.

### **International Association of Chiefs of Police**

In 2012, the International Association of Chiefs of Police (IACP) issued guidelines for the use of UAVs by law enforcement. Some of their suggestions included accountability requirements, public engagement and notification of intended drone use, and warrant requirements in the pursuit of criminal activity that create intrusions on the reasonable expectation of privacy (IACP, 2012).

The IACP understands both the costs and the benefits that UAVs offer for law enforcement agencies and has suggested striking a balance between the two. Their recommendations conflict with the arguments made in the McNeal testimony and fall more along the lines of various state legislation that has been passed in recent years.



The fact that these recommendations were made by an organization comprised of law enforcement personnel, suggesting regulations on themselves, causes it to carry more weight in the argument for drone regulations than McNeal's argument against it. By recommending warrant requirements, training, transparency, and other accountability measures, the IACP is stating that regulations on drone use would not hinder the ability of law enforcement agents to do their job, but safely advance it. Their recommendations also seem to suggest that even law enforcement sees a distinct difference in privacy risks of Unmanned Aerial Surveillance and surveillance by airplanes, helicopters, or patrol cars.

### **Basis in Legislation**

Twenty states have adopted drone limiting legislation and five have adopted resolutions. As other states consider whether or not to impose some form of regulation, the issue will have to also come before Congress in order to eliminate the bifurcation between what state police and federal law enforcement would be able to do. In order to formulate both federal policy and state policy, it would be beneficial to consider both the IACP's guidelines and a combination of the crucial portions of existing state statutes regarding drone regulations.

In *Olmstead v. United States* (1928) it was recommended in the majority opinion of the Court that if there was strong support for a protection from invasive actions, then it was up to the legislative bodies to enact legislation that would do so. It is important however, that any suggestion for federal legislation regarding public drone use should combine the key elements of state legislation. Legislators should consider a warrant requirement for drone searches, as well as define a baseline of what a reasonable expectation of privacy is. Any

possible legislation should allow for exceptions to the warrant requirement for risks of terrorism, exigent circumstances, routine government functions, and search and rescue missions. Future legislation should also include the exclusion of illegally obtained evidence in a criminal trial as well as timeline for the destruction of personal information that is obtained. It would also be practical to allow for remedies for the violation of drone legislation and require mandatory training for drone operators, the establishment of an oversight board, and a protocol for the transparent recordkeeping of drone operations. These elements would, for the most part, secure the privacy interest of citizens without inhibiting the effectiveness of governmental operations.

The states have often been called the laboratories of democracy and they are speaking with a growing voice. The states reflect both the will of the people and, according to *Katz v. United States* (1967), the will of the people determines what society sees as a reasonable expectation of privacy. The above proposal pulls key aspects of various state statutes and from the guidelines set by the International Board of Police Chiefs which reflect not only the growing opinion of citizens, but of the decision makers in law enforcement as well.

### **Basis in Case Law**

Although *Ciraolo* and *Dow Chemical Company* tend to point the Court in a pro drone direction, cases like *Katz* and *Jones* pull the Court towards a more controlled-use view of technology. While some argue that drone technology is merely another vantage point from which law enforcement may legally obtain information, others argue that technology has surpassed jurisprudence and, as in both *Katz v. United States* (1967) and *United States v. Jones* (2012) demand a valid warrant prior to utilization.

In *Katz v. United States* (1967), the state attempted to argue that placing a listening device outside of the phone booth did not violate the Fourth Amendment for two reasons. First, it was not a physical entry; however, in *Silverman v. United States* (1961), the Court determined that a physical intrusion was not necessary for an action to be considered a search. Second, the state argued that there was no actual seizure of evidence, merely sound waves, but the Court ruled in *Warden v. Hayden* (1967) that evidence is not always tangible. In a similar fashion, UAVs obtain information without a physical entry and that which is not tangible, but still possibly incriminating, but most importantly can be utilized without the requirement for probable cause.

In *United States v. Jones* (2012), the Court examined GPS technology. Similar to drone technology, GPS technology is readily available to the public. Yet, when law enforcement in the District of Columbia placed a tracking device on Jones's car, it was determined to be an unconstitutional search within the scope of the Fourth Amendment. Jones's vehicle traveled on public streets, which could have been followed by a patrol car or a helicopter, but law enforcement agents decided to utilize technology as a human replacement. A tracking device requires less manpower and money than undercover operations or helicopter surveillance, as does drone technology, but the Supreme Court struck down the employment of the tracking device without prior obtainment of a warrant. This is based on the Court's reasoning for the ruling in *Kyllo v. United States* (2001), through which it established that when technology offers insight that could not have otherwise been obtained without a physical intrusion or the use of that technology, such an action is considered a search.

The Court determined that the employment of a GPS device violated the common-law trespassory test, which prohibits the government from obtaining information without a warrant from any of the items listed in the text of the Fourth Amendment: “persons, houses, papers, and effects.” The Court in a sense placed the Katz reasonable expectation standard on the back burner and brought the more textualist standard to the forefront. Rather than explicitly choosing one over the other, the Court has augmented the common law trespassory test with the Katz reasonable expectation standard. According to the Court, the two do not mitigate each other (*United States v. Jones* 2012). Therefore, any information obtained without a warrant from a person’s home, papers, or effects that was intended to be kept private, through the use of a drone would violate both common law and the reasonable expectation of privacy test. Drone technology is in fact comparable to the circumstances surrounding *U.S. v. Jones* (2012) because like UAVs, a GPS tracking device can also be bought both online and in stores, some for less than one hundred dollars ([www.amazon.com](http://www.amazon.com)).

As mentioned drone technology is not so different from the GPS technology used in *United States v. Jones* (2012) or even the listening device used in *Katz v. United States* (1967), except for the fact that more intimate details may be obtained through the use of sophisticated drone technology than from a global positioning system or even a listening device. Not only does the advent of drone technology offer the potential to look into the more intimate details of a person’s life, it can travel in the airspace above privately owned property, which the Court has mentioned can, at times, violate one’s rights. This differs from ordinary public vantage points, as they do not ordinarily affect one’s use of his or her property nor do they traverse an individual’s property. Fences can be constructed, covers, and other structures can all be used to conceal activity from ground level or from a distance.

Drones offer the capability to close that distance from an aerial perspective. Navigable airspace is considered to be a public highway (*United States v. Causby*, 1946), but that considered the flight altitudes of airplanes, which only come close to private property during landing or takeoff. The airspace directly above a person's property, navigable by drones, can directly affect the use of that property. Under *United States v. Causby* (1946) any flights over private land that are low and frequent that create an interference with enjoyment and use are unconstitutional under the Fifth Amendments "Takings Clause". Drones even offer the capability to fly lower than ordinary surveillance aircraft, as per FAA regulations, which allows them to fly any vertical distance below 500 feet.

Furthermore, unlike ordinary ground or aerial surveillance from an airplane, citizens have relatively few ways to protect their private property or the intimate details of their lives from the image capturing capabilities of a drone. It would place an unfair burden on the people to require them to protect their privacy from every observable angle due to an advance in technology. It was determined in *Rios v. United States* (1960) that, when evidence which is intended to be private, even though it is publicly accessible, is obtained without a warrant, arrest, or special circumstances, then that action constitutes a search and seizure under the Fourth Amendment (*Rios v. United States*, 1960, as cited in *Katz v. United States*, 1961). Evidence that could be obtained on a person's private property or within their dwelling should assume the characteristics of private intensions, unless it can be obtained without sensory enhancing technology (*United States v. Jones*, 2012). It is for those reasons that the Court *should be* inclined to strike down any unrestricted use of drone technology in search of private property.

The Court has a long history of precedent that supports the need to reevaluate the meaning of the reasonable expectation standard for the right to privacy and the need for probable cause, especially in regards to progressing technology in a general sense. In *Silverman*, *Katz*, and *Kyllo* the Court concluded and reaffirmed the fact that a physical entry is not required in order to conduct a search. Additionally, in *Coolidge v. New Hampshire* (1971), the Court determined that searches should be as limited as possible and that the purpose of the Fourth Amendment was to prohibit the ability of government to participate in general searches, something that developments in technology and recent court cases like *Ciraolo*, *Dow Chemical Company*, and, to an extent, *Kyllo*, seem to contradict. The rulings in *New Jersey v. T.L.O.* (1985) and *Vernonia School District* (1995) tells us that there is a two pronged test that is to be used when considering the validity of a search; the first of which is that a search has to be justified at its inception. Therefore, the use of drones or similar sense enhancing technology without a warrant is likely to fail this first test of reasonableness if it is construed as a general search. This of course only applies to private property, public lands are and should be susceptible to general surveillance searches, unless there is an expectation of privacy such as a phone booth.

*Kyllo v. United States* (2001) provides the argument that any information that is gained that otherwise could not have been obtained without an intrusion is also an invasion of privacy. Furthermore, *Ventresca*, *Johnson*, and *Chapman* all suggest that, in any situation where the necessity of a warrant is questionable, it is more sensible to obtain a warrant as a means of preserving the rights of citizens over the difficulties that it places on law enforcement. Therefore, any ambiguity caused by the current reasonableness standard should be safeguarded by Fourth Amendment search protections.

In *U.S. v. Jones* (2012), the Court augmented the common law privacy protections of the Fourth Amendment with the Katz reasonable expectation protections, stating very clearly that the two are not to be interpreted as competing views. It was also interpreted in *Beck v. Ohio* (1964), as well as various other cases, that the Fourth Amendment restrictions on government searches are to protect the citizens from the whims and swift actions of law enforcement (see *Silverman v. United States* 1961; *Coolidge v. New Hampshire* 1971). In the event that the rights of the citizen must yield to the necessity of a search, the result of *Johnson v. United States* (1948) and other case law requires that such governmental action be taken through the procurement of a warrant approved by a neutral third party.

Precedent speaks volumes and it is crucial when debating the necessity of a warrant for searches in the advent of both technological proliferation and evaporating individual privacy, but it is also important to remember that state legislatures, acting as the voice of the people, are passing laws in growing numbers that protect citizens from the potential for governmental overreach through the use of drone technology; these laws also happen to be congruent with the beliefs set out by the International Association of Chiefs of Police. The growing pressure from the people, in the form of their duly elected representatives, and acceptance by law enforcement should be noted by both the Congress and the United States Supreme Court in the near future when determining the direction that the nation will take regarding the right to privacy.

Preemptive actions to protect privacy would require state and federal legislatures to enact law that do so, but there has been a rise in partisanship and legislative inaction. Therefore, I suggest that the Court strongly consider acting in a reactionary manner, should the situation present itself, to reevaluate the precedent set by cases such as *Ciraolo*, to

reestablish the necessity of probable cause for searches of private property, and to strengthen the deference for a warrant prior to searches of private property in the absence of exigent circumstances.



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